In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1894

SIDNEY FLAXMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his use of the mails was not an integral part of his scheme to defraud the State of Illinois and that federal prosecution was an unwarranted invasion of the State's authority to administer its own revenue collection procedures.

After a bench trial, petitioner was convicted on eight counts charging use of the mails to execute a scheme to defraud (18 U.S.C. 1341) and conspiracy to commit that offense (18 U.S.C. 371).[1] He was sentenced to concurrent terms of two years' imprisonment on each of the first four counts and to concurrent terms of two years' probation on each of the last four counts, the probation terms to run consecutive to the prison terms. The court of appeals affirmed in a thorough opinion, upon which we rely (Pet. App. 1-9; 495 F. 2d 344).

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[1]Three co-defendants pleaded guilty. A fourth became a fugitive.

The evidence, which is accurately summarized in the opinion of the court of appeals, showed that petitioner, a certified public accountant, was hired to prepare the Illinois Retailers' Occupation Tax returns for the Steinberg-Baum Company. Between January 1, 1968, and January 30, 1971, petitioner knowingly prepared and caused to be mailed to the Illinois Department of Revenue monthly returns that understated the company's sales by a total of approximately $32 million. The returns called for the retailer's gross sales receipts, deductions (including any wholesale sales), and net taxable sales. The evidence showed that petitioner reported only the net figure, which he represented as the gross receipts figure. Moreover, he derived the net figure by deducting from the actual gross receipts fictitious wholesale sales figures furnished to him by the company's president. The court of appeals agreed with the district court's finding that petitioner must have known that the fictitious wholesale sales figures, amounting to 90 percent of the gross receipts, were erroneous. "* * * 'He had to know what was wrong.' There was sufficient evidence of intent to defraud" (Pet. App. 5).

1. Petitioner contends that there was insufficient evidence to convict him under the mail fraud statute, 18 U.S.C. 1341, because the mails were "not used here to accomplish the scheme" (Pet. 9). He argues that the scheme had "reached fruition" when the false returns had been executed by the company official and checks had been drafted for the amount due as shown on the returns (Pet. 8), and that the subsequent use of the mails was "utterly tangential to the execution of the scheme" (Pet. 9).

As the court of appeals correctly stated, however, "even assuming that the returns could have been delivered to Springfield by private messenger, an essential part of the scheme to defraud was the delivery, and here it was by United States mail, bringing the activity in question within federal criminal jurisdiction" (Pet. App. 7).

This case is thus unlike *United States* v. *Maze*, 414 U.S. 395, where this Court held that the success of a fraudulent credit card scheme did not depend upon the mailing of invoices by the defrauded merchants. Those mailings, the Court held, were directed only "to the end of adjusting accounts" among the victims of the scheme and were not an essential aspect of the scheme itself (414 US. at 402). Here, by contrast, "the delivery to the revenue office was an integral part of the scheme" (Pet. App. 8). Indeed, "the most significant act to accomplish the scheme was the delivery to Springfield. Fruition was brought about directly by the use of the mails" (*ibid.*).

2. Petitioner further contends (Pet. 9-13) that his criminal acts were not subject to federal prosecution because the State of Illinois, the victim of the scheme, has its own laws for punishing tax violators. It is settled, however, that an offender whose behavior constitutes both a federal and a state crime may be prosecuted by either or both jurisdictions. *Bartkus* v. *Illinois*, 359 U.S. 121; *Abbate* v. *United States*, 359 U.S. 187. "The fact that a scheme may violate state laws does not exclude it from the proscriptions of the federal mail fraud statute, for Congress 'may forbid any * * * [mailings] * * * in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not' " (*Parr* v. *United States*, 363 U.S. 370, 389). Consequently, as the court of appeals stated, "[j]ust because the State of Illinois was the victim and makes such a scheme illegal does not preclude the Federal

Government from prosecuting the perpetrators under an applicable federal law" (Pet. App. 8).[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[2]Although petitioner claims that Illinois "did not consider itself to have been defrauded" (Pet. 10), there is nothing in the record to support that assertion. One witness testified that, "after a previous period of years had been settled with the State of Illinois and there were ongoing negotiations for a new period," the company began to report 50 percent of its sales instead of 10 percent (Tr. 208). But even if the State had agreed to a settlement in lieu of prosecution, that does not mean that it acquiesced in the company's illegal conduct; nor does it mean that the scheme was not one to defraud the State of tax revenues owed to it.